

II. SCOPE OF STATEMENT AND SUMMARY

8. This statement contains our preliminary opinions concerning interconnection and access to unbundled network elements (UNEs) that SWBT is providing or offering in Oklahoma, based on interconnection agreements that have been approved by the Oklahoma Corporation Commission (Commission), SWBT's Statement of Generally Available Terms and Conditions recently filed in Oklahoma (SGAT), and the November 13, 1996 Arbitrator's Report and the December 12, 1996 Order Regarding Unresolved Issues entered in arbitration proceedings before the Commission between AT&T and SWBT under the FTA, Docket No. PUD 960000218 (Oklahoma AT&T Arbitration Order). Specifically, we will describe the access that SWBT currently provides or offers in Oklahoma concerning the following items from the "competitive checklist" found in Section 271(c)(2)(B): access to unbundled network elements generally; unbundled local transport; unbundled local switching; interconnection; and unbundled local loop transmission. We also will address collocation as one of the required means for providing interconnection and access to unbundled network elements. Other AT&T witnesses will address other items on the competitive checklist.

9. In performing this analysis, we have chosen to discuss how each of these "competitive checklist" requirements fails to be met by (1) Oklahoma interconnection agreements; and (2) SWBT's SGAT. As explained in the Statement of Edwin Rutan, SWBT necessarily must seek Section 271 authority to provide in-region interLATA services under Track A. For Track A purposes, SWBT's SGAT is irrelevant not only because SWBT must actually be providing access and interconnection to predominately facilities-based, "competing" carriers pursuant to approved interconnection agreements, but also because it is those interconnection

agreements which must fully implement the competitive checklist.¹ Nevertheless, to ensure a complete record for each checklist item, we have also analyzed whether the SGAT meets the applicable requirements of the checklist.

10. In summary, we conclude that, at the present time in Oklahoma, SWBT is neither providing nor offering nondiscriminatory access to unbundled network elements on the terms and conditions required under the FTA. To our knowledge, there has been no implementation of UNE purchasing in Oklahoma that would permit any conclusion about the quality of access to SWBT unbundled elements in this state. Even on their face, both SWBT's Oklahoma interconnection agreements and its SGAT impose limits on CLECs' use of unbundled network elements that do not apply to SWBT and are not recognized under the FTA. In particular, neither SWBT's Oklahoma agreements nor the SGAT permits CLECs to combine elements effectively in order to provide a telecommunications service. In addition, SWBT's plan to treat all UNE orders as "disconnect/reconnect" orders for "designed services" threatens to cause unnecessary service interruptions, unwarranted charges and inferior service for customers whom a CLEC converts from SWBT retail service to CLEC service provided through a combination of UNEs. The result will be to erect a substantial discriminatory barrier to a critical route of market entry.

11. Both SWBT's Oklahoma interconnection agreements and the SGAT fail to provide the required access to unbundled network elements in other respects. Neither offers access to dark fiber, despite the fact that the AT&T Arbitration Order requires that those network elements be unbundled. Neither includes complete local switching functionality as required by the FTA and the FCC's implementing regulations. Customized routing, while offered in principle, is likely

¹ From a CLEC perspective, the SGAT is largely irrelevant as well, because of the substantial deficiencies described herein. In a nutshell, the SGAT is a bad deal for Oklahoma.

to prove extremely difficult for a CLEC to obtain in practice, for reasons unrelated to technical feasibility issues.

12. Both SWBT's Oklahoma agreements and the SGAT also leave many unknowns regarding the access to unbundled elements that actually will emerge in Oklahoma. The utility of the measurements to be developed under the SWBT/Sprint agreement to ensure that the elements provided by SWBT will perform at the promised "parity" will not be known for at least several months. The SGAT, meanwhile, offers no practical means whatever of measuring whether such "parity" has been achieved. Both the agreements and the SGAT leave open the possibility that SWBT will identify additional charges or rate elements that the parties will have to negotiate and apply to the UNEs during the term of a purchase agreement.

13. In our opinion, it simply is premature to consider whether SWBT is providing access to unbundled network elements in Oklahoma on terms and conditions that are just, reasonable, and nondiscriminatory. For Track A purposes, as explained in the Statement of Edwin Rutan, this must be determined based solely on the SWBT Oklahoma interconnection agreements. But this is equally true of the SGAT. There is no meaningful record of implementation of SWBT's negotiated agreements concerning UNEs, AT&T and SWBT have not yet been able to conclude negotiation of an interconnection agreement, and no UNE implementation has taken place under the SGAT, to our knowledge.² Without some implementation record, any reviewer should be very cautious to conclude that the terms of a written interconnection agreement or SGAT bring an incumbent LEC into compliance with unbundling requirements that are contrary to the incumbent LEC's long-held interests as a regulated monopolist. Even if review is confined to the written terms of the SWBT Oklahoma

² For example, at this time, not a single unbundled loop has been provisioned to a CLEC anywhere in the State of Oklahoma.

interconnection agreements and the SGAT, however, we have identified serious inadequacies and restrictions in the access being offered by SWBT to its unbundled network elements, which we have outlined above and describe in further detail below.

III. COMPETITIVE CHECKLIST ITEM -- ACCESS TO UNBUNDLED NETWORK ELEMENTS

A. New Entrants' Access to UNEs Cannot Be Evaluated Prior to Some Meaningful Opportunity For Implementation.

14. Item (ii) in the FTA competitive checklist requires a Bell operating company (BOC) to demonstrate that it is providing "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Section 251(c)(3) requires an incumbent LEC to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory" That section also requires an incumbent LEC to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide [a] telecommunications service." Section 252(d)(1) requires that UNE pricing be based on cost.

15. SWBT may suggest that the Commission's approval of negotiated interconnection agreements under FTA § 252 (US Long Distance, Inc. (USLD); Brooks Fiber Communications of Tulsa, Inc. and Brooks Fiber Communications of Oklahoma, Inc. (Brooks) and an interconnection agreement with Sprint that is based partially on arbitration, is sufficient in and of itself to verify checklist compliance for access to unbundled network elements. However, SWBT has offered no evidence, to our knowledge, of actual implementation of UNE access.

16. We are unaware of any UNE purchases under the USLD, Brooks, or Sprint agreements, or under the SGAT for that matter, that would enable any reviewer to reach a

conclusion about SWBT's implementation of access to UNEs in Oklahoma. Without some record of implementation, any conclusions about the quality of access that SWBT is offering or providing can only be speculative, at best. At worst, any CLEC desiring to do business via UNEs will learn that what they do not know will halt them. AT&T has negotiated and signed one interconnection agreement with SWBT to date, pursuant to arbitration in Texas. (AT&T's Texas agreement with SWBT is of more than casual interest here. The SWBT/Sprint Oklahoma agreement identifies as three sources of its terms, conditions and rates: certain FCC Orders, the Commission arbitration award in Docket No. PUD 960000218, and "SWBT's draft interconnection agreement with AT&T in Texas". Sprint Agreement at § 4.1. The SWBT/Sprint Oklahoma agreement allows either party to reform provisions of that contract to reflect language in a final commission-approved AT&T/SWBT agreement, including the Texas agreement.) Based on AT&T's experience negotiating that Texas agreement and the first several weeks of implementation efforts, it is clear that even lengthy, carefully negotiated, written contract provisions do not provide a basis for concluding that access to UNEs -- on terms that are just, reasonable, and nondiscriminatory -- is a reality.

17. The SWBT/AT&T Texas contract necessarily left a number of important issues to be worked out between the parties during the first months of implementation -- *e.g.*, development of electronic interfaces, and development of parameters to measure UNE performance for compliance with the parity standard. The parties have encountered dozens of additional serious implementation problems. Disputes have arisen over SWBT's freedom to impose additional charges, not recognized in the agreement, for certain of the elements. These matters threaten to delay implementation of UNE access in Texas. If not resolved properly, a number of these issues could impose costs or technical impediments that would seriously

compromise, if not completely ruin, the viability of using UNEs to compete in the local service market. For example, SWBT's non-recurring charge proposals will likely destroy any business case for UNEs in Oklahoma.

18. AT&T's Texas experience is not surprising. Unbundling local telephone networks is a new activity in which the incumbent LECs are being required to make their facilities available, at cost-based, competitively-neutral prices, to competitors who will try to use the incumbent LECs' facilities to win away the incumbent LECs' customers. Even if one assumes the best of subjective intentions on the part of all individuals involved, the process of unbundling local telephone networks is surrounded by uncertainty and will likely be characterized by fitful progress and frequent disputes. Thus, the existence of negotiated interconnection agreements in Oklahoma that ostensibly provide for UNE access is not, in and of itself, sufficient. Meaningful evaluation of the access provided by an incumbent LEC to its network elements under those agreements should await a real test of that access. Preliminary indications suggest that SWBT will flunk the test, which perhaps explains its haste to obtain Section 271 relief before the results are known.

B. The SWBT Oklahoma Agreements and SGAT Do Not Provide Nondiscriminatory Access to Unbundled Network Elements.

19. Not only has there been no implementation of network element access under the interconnection agreements in Oklahoma, but when evaluated on their written terms, both the SWBT Oklahoma agreements and the SGAT fail to provide the nondiscriminatory, just and reasonable access to unbundled network elements that is required in order to satisfy item (ii) of the competitive checklist.

1. **Both the SWBT Oklahoma Agreement and the SGAT fail to satisfy the competitive checklist because each restricts new entrants' ability to combine unbundled network elements.**

20. The competitive checklist requires that SWBT provide access to UNEs in accordance with the requirements of Section 251(c)(3). This includes the requirement that SWBT provide UNEs in a manner that allows requesting carriers to combine the elements in order to provide a telecommunications service. The FCC's rules require incumbent LECs to allow requesting carriers to combine the elements without restriction: "[a]n incumbent LEC shall not impose limitations, restrictions or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." 47 C.F.R. § 51.309. The Oklahoma AT&T Arbitration Order holds that "there should not be any restrictions placed on what unbundled elements may be purchased and reconfigured." Oklahoma AT&T Arb. Order at 5.

21. One likely use of unbundled network elements for a new entrant is to order from the incumbent LEC the complete combination of elements needed in order to deliver telecommunications service to a retail customer through a physical configuration of network facilities that is unchanged from the facilities that serve him or her today. That is, the new entrant who "wins" a retail customer from the incumbent LEC could order the local loop and local switching that serve that customer, with the same features that have been serving that customer, and could purchase the "common" network elements (common transport, tandem switching, signaling and databases, operator services and directory assistance) that would be needed to deliver the same end-to-end service to that customer that had been provided by the incumbent LEC. By means of such an unbundled network elements "platform," the entrant may

obtain the benefits of cost-based pricing, creating the opportunity for more competitive retail pricing offers and at the same time, giving it the flexibility to design customized offers, particularly for vertical services. From such a platform, the new entrant may begin to offer services that it cannot provide by reselling the incumbent LEC's services; in a resale mode, the new entrant can only mimic the incumbent LEC's retail services. A UNE platform, by contrast, is the means by which a new entrant may offer services that are differentiated from the incumbent LEC's products and services, without having to enter the market with a network that duplicates the incumbent LEC's existing network.

22. With time and development of its customer base, the entrant can substitute its own facilities more broadly. For example, the entrant may choose to substitute its own OS/DA services for the OS/DA element by adding customized routing in the UNE local switch. Combining UNEs in this fashion thus creates an economic, marketing, and technical basis for transition to facilities-based competition.

23. The FCC has rejected the position, advanced by some incumbent LECs, that a carrier must own or operate some of its own facilities before it may order unbundled network elements. It has recognized that a requesting carrier may combine UNEs so as to offer the same or similar services that incumbents offer for resale. FCC Order, ¶ 331.³ The FCC has taken the view that such combinations are permitted under the FTA and may serve procompetitive purposes. *Id.* The Commission has agreed with the FCC. It has held that AT&T may recombine unbundled network elements without restriction, including combinations to create a service which SWBT provides at retail. Oklahoma AT&T Arb. Order at 5. In approving a CLEC's use of this complete UNE platform, the Commission joined not only the FCC, but each

³ *In the Matter of Implementation of Local Competition Provision of the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. Aug. 8, 1996) (FCC Order).

state that has been presented with this issue by AT&T and SWBT. See Texas Arbitration Award at 6; Kansas Arbitration Order at 43; Missouri Arbitration Order at 13; Arkansas Arbitration Order at 28.

24. SWBT, doubtless recognizing that the use of a combined platform of unbundled network elements represents a valuable tool in the hands of new entrants seeking to bring competition to consumers of local telephone service, has opposed such combinations at every turn. It has been unwilling to acknowledge or follow the FCC's ruling on this issue. It has forced AT&T to arbitrate the right to use the complete platform of unbundled elements in each of the five SWBT local service states, losing each ruling noted in the paragraph above. And it has appealed the first of those rulings, in Texas, characterizing the use of the UNE platform as "sham unbundling." *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc., et al.*, Civil Action No. A-97-CA-4455, United States District Court for the Western District of Texas, Austin Division, Complaint For Declaratory and Injunctive Relief at p. 19, ¶ 49 and p. 28, ¶ 72 (filed January 1997)(complaining that both FCC Order and Texas Arbitration Award permit "sham unbundling"). SWBT can be expected to place obstacles in the path of new entrants' use of the UNE platform at every opportunity, as its offerings in Oklahoma to date demonstrate.

a. **SWBT Oklahoma agreements and the SGAT expressly prohibit certain UNE combinations.**

25. SWBT's Oklahoma interconnection agreements with Brooks and USLD explicitly prohibit those CLECs from ordering the complete combination of UNEs required to reproduce a SWBT retail service, contrary to the federal and state commission decisions described above. Appendix UNC of those agreements provides as follows on page 2: "LSP shall not cross-connect a SWBT unbundled loop to a SWBT provided unbundled switch port." Under this

provision, the CLEC cannot provide telecommunications service to a retail customer unless the CLEC provides its own loop or switch (or one owned by a third party). With this limitation, the access to UNEs provided under the Brooks and USLD agreements falls well short of the access that SWBT must provide to satisfy Section 271.

26. The SGAT also reflects SWBT's resistance to UNE combinations. Section 2.2 of the SGAT's Appendix UNE omits the recognition in the Sprint agreement that elements may be ordered "without restriction." *Compare* SGAT, APPENDIX UNE § 2.2 *with* Sprint Agreement, Attachment 6, § 2.4. The SGAT also omits the Sprint agreement's recognition that the CLEC need not own any facilities to order UNEs.

- b. **SWBT's Oklahoma UNE implementation threatens unnecessary service interruptions, unjustified nonrecurring charges, and inferior service to CLEC retail customers served by UNE combinations.**

27. The Oklahoma Sprint interconnection agreement and the Oklahoma SGAT include language that appears more friendly to UNE combinations. However, this access to the UNE platform thereby provided is more apparent than real. Both documents also provide that, when converting a SWBT account to the CLEC's UNE service, the conversion will be handled as a disconnect of the current account and a new connect of the unbundled network element account. In current Oklahoma negotiations, SWBT has made clear to AT&T that it has decided to treat all UNE orders in Oklahoma as orders for a "designed service." This position poses serious competitive disadvantages to CLECs attempting to win and serve customers by ordering UNE combinations. It provides access to unbundled network elements that is inferior to the access SWBT provides to itself. The Sprint interconnection agreement does provide for customer migrations whereby "SWBT will not physically disconnect intentionally the elements that are

currently connected at the time the orders are placed."⁴ Although this language appears to protect against this "disconnect/reconnect" issue, it is unclear how precisely SWBT will interpret this language given their negotiating position and the internal conflict with the Sprint Agreement.

28. SWBT serves a residential POTS customer in Oklahoma today through a local loop that runs to that customer's premises and a switch port on the line-side of the SWBT local switch. The local switch may supply various features to the customer, and his or her calls utilize SWBT's signaling system and call-related databases, its OS/DA platform, and its interoffice transport and tandem switches. All those network elements are in place and operational. A new entrant who wins that customer's business should be able to serve that customer, if it chooses, by ordering all the SWBT elements in combination to provide service equivalent to that which SWBT had provided. In order to transfer such a customer from SWBT retail service (or from CLEC resale service) to identical service provided by the CLEC through the same UNEs, the only SWBT activity technically required is the operations support systems activity needed so that SWBT's systems will create the appropriate billing to the CLEC for the elements, track the elements for maintenance purposes, and create the usage data to be provided to the CLEC for its billing purposes. *No physical or software change to the elements that are delivering telephone service to the customer is required*, unless the CLEC requests customized routing out of the unbundled local switch, e.g., to the CLEC's own operator services/directory assistance service. As a technical matter, such a customer could be converted to UNE-based service from the CLEC without any interruption of service and without the CLEC incurring any cost other than the cost associated with processing the relevant OSS orders. No work would be required within the loop or switch itself. It is, or should be, entirely an OSS transaction. Even

⁴ Sprint Agreement, Attachment UNE, § 2.5.

when customized routing is requested, the only change required at the time of converting a customer to UNE-based service is the execution of a "recent change order" in the switch, which requires interruption of customer service only for the length of time necessary for processing the change, a fraction of a second -- again, no rearrangement of physical facilities is required.

29. SWBT has informed AT&T that it has made an internal determination to treat all UNE purchases as special designed services. Today, SWBT's POTS circuits are maintained under the Local Maintenance Operation System (LMOS); that system interfaces with the Mechanized Loop Testing (MLT) system to provide automated loop testing through the local switch. There is no technical reason why a local loop and switch port maintained under LMOS today could not be maintained under that system when purchased in combination as unbundled network elements. However, SWBT has informed AT&T that it plans to transfer all circuits that are ordered as UNEs to its Work Force Administration system (WFA). That system has ordinarily been used in the past for special designed circuits, such as PBX trunks. In order to test WFA circuits, SWBT must use its Special Maintenance Access System (SMAS) and Special Access Remote Testing System (SARTS). These non-automated systems allow an operator to sectionalize a circuit and locate the source of a trouble. In order to use SMAS and SARTS for its local loops, SWBT will have to install a SMAS test point, requiring a physical disconnection of service over that loop.

30. The use of the WFA and SMAS/SARTS systems may be appropriate for some UNE orders, where some more detailed design specification may be necessary to provide appropriate interconnection of SWBT's elements and a particular CLEC facility. Those systems are not necessary for all UNE orders, however, and they surely are not necessary when a CLEC orders in combination the loop and switch port that currently serve a SWBT customer who is

converting to the CLEC's UNE-based service. SWBT's choice of systems would be a matter of no relevance to AT&T or other CLECs if it had no impact on their access to unbundled elements or their opportunity to enter the market through UNE-based service. In fact, however, the transfer of all UNE circuits to the WFA system, with the installation of SMAS test points in local loops, would result in a serious competitive disadvantage to new entrants and would deprive them of the ability to combine network elements in order to provide a telecommunication service on a basis equivalent to SWBT.

31. One consequence of treating all UNE circuits as special designed circuits would be to require a customer service outage whenever a SWBT customer is converted to UNE-based service, in order to install a SMAS test point in the local loop. For a new entrant to be required to tell its prospective customers that they must expect an interruption of service, even if brief, represents a very serious competitive disadvantage, both for residential and business customers. Section 251(c)(3) requires SWBT to provide access to UNEs on terms that are just and reasonable, as well as nondiscriminatory; the FCC has stated that "these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." FCC Order, ¶ 315. Causing an unnecessary service interruption for the customers of carriers who choose to use UNE combinations as one market entry strategy does not meet this standard.

32. SWBT's "designed circuit" approach also would impose unnecessary non-recurring charges on CLECs. Under the SGAT, a CLEC who ordered a 2-wire analog loop and analog line port in combination (if UNEs actually can be ordered under the SGAT) would incur a nonrecurring charge of \$47.45 for the loop, \$80.50 for the switch port, plus a "new service" service order charge of \$60.00, a total of over \$187.95. SGAT APPENDIX PRICING Schedule

at 9. Under the Oklahoma Sprint interconnection agreement, this order would result in a nonrecurring loop charge of \$47.45 for the loop, \$82.60 for the switch port, and an unspecified service order charge, for a total in excess of \$130.00. Sprint Agreement, Attachment 6, § 13.6.3 and Appendix Pricing UNE. Yet the conversion of the SWBT loop and switch port to UNE service for the CLEC requires no activity on SWBT's part other than service order processing. Other than installing a SMAS test point, which is required not by technical necessity but by SWBT's apparent business determination regarding administration of UNEs, the only "one-time" expenses associated with provisioning a local loop/local switch combination order without feature changes should be service order processing expenses. As applied to such orders, SWBT's nonrecurring charges do not meet the cost-based standard of Section 252(d)(1).

33. Placing all UNE circuits in the WFA system also creates a likelihood that the service provided to customers through unbundled network elements ordered by CLECs will be inferior to the service that SWBT provides for its customers through the identical network components. LMOS enables SWBT to conduct proactive, automated testing of customer loops. For POTS circuits administered in LMOS, the MLT system in SWBT's local switches runs routines that test loops and report out problem loops. Once POTS circuits are transferred to WFA, however, the CLEC's UNE-based customers will lose the preventive benefits of MLT testing. WFA and SMAS/SARTS do not provide automated testing; they are reactive systems. This discrimination is entirely unnecessary.

34. Once UNE circuits providing POTS service are transferred to the WFA system, troubles on those circuits will be competing for technician attention with the special circuits that have been in the WFA system in the past. Troubles on a DS3 facility, with multicustomer impact, will take priority over UNE POTS circuits. In addition, WFA technicians often will not

have been trained for service on POTS circuits. In the LMOS system, on the other hand, POTS circuits are the norm. Finally, the WFA system has in the past been reserved for a small percentage of SWBT circuits. To determine whether nondiscriminatory provisioning and maintenance of UNEs could be provided through WFA (leaving aside the customer outage and nonrecurring charge issues), a reviewer would have to be satisfied that SWBT had devoted the resources and personnel necessary to accommodate a substantial increase in the demands on the WFA system. SWBT has unnecessarily added a labor-intensive activity (installation of SMAS test points) for every conversion of a customer to UNE platform-based service. One is left to wonder how many conversions SWBT will be able to accomplish per day through its WFA workforce. SWBT's decision to treat all UNE orders as designed service orders threatens to operate as a gating factor that substantially limits this route of entry into the market.

35. SWBT has suggested elsewhere that the access it provides to unbundled network elements will be nondiscriminatory almost by necessity, because the elements it will be selling are the same elements it is using in its network to deliver service to its customers and it will be difficult or in some instances impossible to operate the network in a way that would discriminate between components that are serving as UNEs and components that are serving SWBT retail customers. However, the decision to treat all UNEs as designed services will create two separate systems in Oklahoma -- one for SWBT's POTS customers and one for CLEC customers receiving POTS service through unbundled local switching/local loop combinations. The latter face a service interruption, unnecessary nonrecurring charges, and potentially inferior maintenance.

36. The SGAT and Sprint agreement require that conversion of a SWBT customer to a UNE account be accomplished through disconnect and reconnect orders. This is consistent

with SWBT's business decision to use the WFA system for all UNE circuits in Oklahoma. To date, all requests by AT&T that SWBT modify its approach to UNE implementation have been unavailing. SWBT has told AT&T pointedly that its decision to take all UNE circuits out of LMOS is an internal SWBT business decision. Against this background, SWBT's Oklahoma agreements and its SGAT offer no meaningful evidence that access to unbundled network elements will be provided on terms that are just, reasonable, and nondiscriminatory. In order for SWBT to provide access to UNEs at parity with its own access to those facilities, SWBT must demonstrate that purchasers of UNE loop/switch combinations (plus common elements) will not be subject to interruptions of customer service that are not technically essential in order to fill those orders, that they will not be subject to nonrecurring charges unrelated to real one-time costs necessarily incurred by SWBT, and that those loop/switch UNE combinations will be maintained at parity with the loops and switches through which SWBT serves its customers.

2. The SWBT Oklahoma agreements and SGAT place other inappropriate limitations on the use of unbundled network elements.

37. The SGAT provides that UNEs "may not be connected to or combined with SWBT access services or other SWBT tariffed service offerings" (other than collocation services). SGAT, APPENDIX UNE, § 2.1. SWBT and Sprint "agreed to disagree" about this issue in their Oklahoma agreement, with SWBT adhering to the position stated in the SGAT. See Sprint Agreement, Attachment 6 § 2.1. By this limitation, SWBT is offering less than the full access to unbundled network elements required under Section 251(c)(3) of the FTA.

38. As stated previously, Section 251(c)(3) requires UNEs to be provided "in a manner that allows requesting carriers to combine such elements in order to provide" a telecommunications service. The FCC has concluded "that this language bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of,

unbundled network elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend." FCC Order, ¶ 292.

39. To take an example, once unbundled network elements become available, a CLEC may choose to purchase an unbundled DS1 loop and cross-connect that loop to SONET facilities purchased out of the STN tariff. Through this combination the CLEC can provide private line service to a customer. The CLEC's use of the UNE facilities in this example is for the provision of a telecommunications service, as the FTA defines that term. FTA § 3(51). Nothing in the FTA permits an incumbent LEC to restrict the CLEC from providing telecommunications services in this fashion. SWBT has made clear in current Oklahoma negotiations that it intends to impose this limitation on AT&T as well. When asked to justify its position, SWBT offers only that it can find nothing in the FTA that permits the combination of elements with the use of facilities purchased under tariff. SWBT has it backwards. The FTA permits CLECs to use UNEs, without restriction, however they deem appropriate to provide a telecommunications service. The intent is to foster competitive creativity. By foreclosing new entrants from combining unbundled network elements with tariffed services that may be used to provide a telecommunications service, SWBT's Oklahoma offerings fail to offer CLECs the ability to combine elements as required under Section 251(c)(3) of the FTA.

3. SWBT has not provided unbundled access to dark fiber in Oklahoma.

40. None of SWBT's Oklahoma agreements, nor its SGAT, offers CLECs access to SWBT's dark fiber (fiber optic transmission media that has been deployed by SWBT but currently has no electronics on it). The FCC declined to address dark fiber unbundling, citing insufficient information, and stated that it would continue to review and revise its rules in this area. FCC Order, ¶ 450. Since that time, SWBT has remained unwilling to make dark fiber

available except as ordered by regulatory authorities. AT&T has presented the issue for arbitration in each of the five states where SWBT is the incumbent LEC. Each state that has completed an arbitration has ruled that SWBT must unbundle at least some dark fiber, subject to conditions that vary from state to state. See Texas Arbitration Award at 4, 6; Order Regarding Unresolved Issues, Cause No. PUD 960000218 at 4 (Oklahoma Corporation Commission, December 12, 1996); Missouri Arbitration Order at 10, 11. In both Kansas and Arkansas, arbitrators have ruled that SWBT must offer access to dark fiber. See Kansas Arbitration Order at 42; Arkansas Arbitration Order at 28. The Kansas Arbitration Order holds that SWBT "must allow AT&T access to SWBT's 'dark fiber,'" based on the Arbitrator's belief that "it is in the public interest and in the interest of competition to permit AT&T access to unused transmission media." See Kansas Arbitration Order at 42.

41. The opportunity to purchase or lease dark fiber will reduce the costs and time required for CLECs to provide facilities-based local service. "Requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." FCC Order, ¶ 286. The Arkansas Arbitrator cited this language in support of her recent ruling that dark fiber must be unbundled, adding that dark fiber will benefit the incumbent LEC as well -- revenue will be generated from unused assets, and the risk of stranded investment in excess capacity will be reduced. See Arkansas Arbitration Order at 27. She concluded that SWBT "could provide no credible reason why it is not technically feasible to provide dark fiber as a UNE as it has been ordered to do in three other states." *Id.* Given the record that has been developed through these state arbitrations supporting the feasibility and benefits of dark fiber access and the consistent rulings

that require dark fiber unbundling throughout SWBT's local service territory, this conclusion follows: SWBT has not established it meets the checklist requirement of providing UNE access on terms that are nondiscriminatory, just and reasonable, until it provides access to its dark fiber. It has not done so in Oklahoma.

4. SWBT's Oklahoma offerings create other uncertainties that foreclose any determination for now that full UNE access is being provided.

42. SWBT's Oklahoma agreements and its SGAT do not commit that the network elements it unbundles will meet industry performance standards applicable to such equipment. SWBT's offerings contain no commitment that its network elements will meet "ordinary" or "reasonable" performance standards. SWBT even disclaims basic commercial warranties. Both the Sprint agreement and the SGAT disclaim all warranties, express or implied, including the warranty of merchantability and the warranty of fitness for intended or particular purpose. *See* Sprint Agreement, General Terms and Conditions, § 52.1; SGAT § XXX.

43. SWBT commits only that the network elements will meet applicable regulatory standards and be at least equal in quality and performance as that which SWBT provides itself. *See* Sprint Agreement, Attachment 6, § 2.17.1; SGAT, APPENDIX UNE, § 2.14.1. Because of the generality of this standard and because SWBT takes the position that it does not provide "unbundled network elements" to itself, it is impossible to know whether the "parity" standard referred to in the Sprint agreement and the SGAT will prove meaningful. The SGAT provides no means of measuring performance to determine whether SWBT is delivering on its parity commitment. The Sprint agreement provides only that the parties will jointly define performance data to measure UNE performance against the parity standard; these measures are to be developed during the first 90 days under the contract. *See* Sprint Agreement, Attachment

6. § 2.17.7. These measurements remain in development, so far as we are aware. The AT&T/SWBT Texas agreement contains a similar provision, and no measures have yet been developed under it. Indeed, in current negotiations for Oklahoma, SWBT has raised the possibility that it will not agree with AT&T to include a similar measurement provision in Oklahoma, unless AT&T agrees to pay performance measurement charges that are not required under either the AT&T Texas agreement or the Oklahoma Sprint agreement. Thus, the availability of meaningful performance data to determine compliance with the parity standard remains very uncertain. Without some such data, there can be no determination that SWBT is providing the nondiscriminatory UNE access required to satisfy the checklist.

44. One additional area of critical uncertainty is UNE pricing itself. The levels of SWBT's UNE pricing are addressed in a separate Statement of Steven E. Turner. The point here is that, price levels aside, SWBT's Oklahoma offerings do not define SWBT's UNE pricing offers with sufficient certainty to enable CLEC's to develop a business plan, much less execute one. The Statement of Nancy Dalton describes the incompleteness of the Texas AT&T/SWBT agreement on the subject of UNE pricing and SWBT's assertion that it may impose UNE rates and charges that are not recognized in that agreement. Those same uncertainties are present in SWBT's Oklahoma offerings.

45. SWBT's Sprint agreement identifies all UNE pricing as interim. It provides further: "All other UNE pricing rate elements not listed will be as determined in future cost proceedings." Sprint Agreement, Appendix Pricing - UNE. That agreement also provides that "[p]rovisioning issues not previously agreed upon by the Parties shall be negotiated by the Parties prior to provisioning such elements." *Id.* at APPENDIX UNE, § 13.2. These provisions appear to leave SWBT the discretion to identify new "UNE pricing rate elements"

and to hold up provisioning any related order until the CLEC accepts a new charge or the issue can be forced into a regulatory proceeding.

46. A comparison of the UNE pricing schedules in the Sprint agreement and the SGAT will show that SWBT already has identified numerous "UNE pricing rate elements" that were omitted from the Sprint agreement. Thus, for example, while the Sprint agreement identifies port and usage charges for local switching, it does not include the "feature activation per port type" charge shown on the SGAT. Compare Sprint Agreement, Appendix Pricing UNE at 49, with SGAT, APPENDIX PRICING Schedule, at 2. It is unclear whether local switching may be ordered under the Sprint agreement, until the parties reach agreement on the feature activation charge. That charge itself is an unknown, listed in the SGAT only as "ICB." However, SWBT has made it clear in current Oklahoma negotiations with AT&T that this charge will apply to any activation of a vertical switching feature. It may well be some time before the true feature activation charge, if any, can be known, for SWBT has taken the position that that charge is outside the scope of the AT&T arbitration and will not be determined in the permanent price proceedings to follow that docket.

47. Under the SGAT itself pricing remains uncertain and open-ended. Section 12.2 of APPENDIX UNE provides: "For any rate element and/or charge contained in or referenced to in this Appendix that are not listed in the attached Appendix PRICING SCHEDULE, including Bona Fide Requests, SWBT and LSP will negotiate prices." Even in the SGAT, where SWBT is unilaterally defining the elements that it will offer and the prices that will apply, it is unwilling to commit that its price list to the CLEC is complete. Sellers of even complex goods and services must provide buyers with a set of prices that the buyer can rely on over a contract term. Otherwise, the buyer's business plan can be defeated at any time with the

unexpected appearance of a new "rate element" that may completely change the bargain or may hold up service while the parties negotiate over this new charge.

48. AT&T hopes that more comprehensive and meaningful UNE pricing will emerge from its current Oklahoma negotiations with SWBT. At best, however, that is only a hope. The Commission cannot determine that SWBT is providing UNE access in accordance with the cost-based pricing required under the FTA until it has before it the complete set of rates that SWBT will charge for UNE service in this state. Neither SWBT's Oklahoma agreements nor its SGAT offer that set.

IV. COMPETITIVE CHECKLIST ITEM -- LOCAL TRANSPORT

49. FTA Section 271(c)(2)(B)(v) requires SWBT to demonstrate to the Commission that it is providing access and interconnection to "local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." SWBT cannot meet this test without a record of implementation. Even on the face of its written offerings in Oklahoma, SWBT cannot meet this test. Indeed, in one important respect the terms on which SWBT is offering and providing dedicated transport contradict the Oklahoma Arbitration Order in the AT&T/SWBT arbitration.

A. SWBT Does Not Fully Provide All of the Functionality of Dedicated Transport By Restricting Access to Multiplexing.

50. Multiplexing is required for CLECS to be able to interconnect unbundled local loops or lower bandwidth dedicated transport to higher bandwidth dedicated transport. Multiplexing is required to take advantage of the economies of scale of higher bandwidth dedicated transport. However, SWBT has failed to include multiplexing functionality in the dedicated transport it is offering to provide in Oklahoma.

51. The dedicated transport provisions of SWBT's Oklahoma Sprint agreement and SWBT's Texas agreement with AT&T are very similar. *Compare* Sprint Agreement, Attachment 6, § 8.2 with SWBT/AT&T Texas Agreement, Attachment 6, § 8.2. SWBT has taken the position in Texas that this language does not require it to provide multiplexing to AT&T; indeed, in SWBT's view multiplexing is not included within the definition of any unbundled network element, and SWBT has no obligation under the FTA to provide multiplexing to CLECs. SWBT surely will take the same position under the Oklahoma Sprint agreement. In current interconnection agreement negotiations with AT&T in Oklahoma, SWBT has steadfastly held to the position that it is under no legal obligation to provide multiplexing, as part of dedicated transport or any other element. It has been unwilling to agree to provide AT&T nondiscretionary access to multiplexing facilities that it uses to provide local service in its Oklahoma network today.

52. Congress intended for new entrants to have "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."⁵ Providing multiplexing to CLECs clearly is technically feasible; SWBT sells a variety of multiplexing to interchange carriers (IXCs) today.

53. The FCC also found that in relation to dedicated transport the "incumbent LEC may not limit the facilities to which such interoffice facilities are connected, provided such interconnection is technically feasible, for the use of such facilities."⁶ Given currently existing multiplexing functionality in SWBT's tariffs and the FCC's intent that interoffice facilities should

⁵ FTA § 251(c)(3).

⁶ FCC Order, ¶ 440.

be connected to any technically feasible point. SWBT cannot justify its exclusion of multiplexing functionality from its Oklahoma offerings.

54. It was not until post-arbitration contract negotiations in Texas that AT&T learned that SWBT construed multiplexing to be a service, distinct from dedicated transport, that SWBT is not obligated to provide under the FTA. Since that time, AT&T has presented this issue to two regulatory commissions, in Kansas and Arkansas. In both states, the Arbitrators have held that SWBT is required to provide multiplexing as part of dedicated transport. In the Kansas Arbitrator's Decision in the AT&T and SWBT arbitration, the Arbitrator found that "SWBT is required to provide all technically feasible types of multiplexing, demultiplexing, grooming, DCS bridging, broadcast, test and conversion features to the extent such services and features are available to SWBT."⁷ In Arkansas, the Arbitrator reached the same conclusion and rejected SWBT's attempt to construe the FCC Order to limit SWBT's obligation to provide multiplexing-type functionality to the DCS functionality provided under tariffs to interexchange carriers. Arkansas Arbitration Order at 31. SWBT, in omitting multiplexing as a function within unbundled Dedicated Transport, has failed to provide the access to local transport that the competitive checklist requires.

55. SWBT has taken cross-connects to an extreme. AT&T has always maintained the position that cross-connects should be included in the unbundled network element that is being purchased. Therefore, if AT&T purchases the unbundled loop, any cross-connect charge would be included in the element cost rather than appearing as a separate item on an unbundled bill. AT&T was not attempting to dodge its financial obligations to pay cost based rates for the element including the cross-connect. AT&T's position was merely practical. Generally, the

⁷ Kansas Arbitration Order at 45.

cross-connect is nothing more than a piece of wire and as such, costs virtually nothing to provide.⁸ SWBT's own definition of a cross-connect is as follows: "[t]he cross connect is the media between the SWBT distribution frame and a LSP designated collocation or to other SWBT unbundled network elements purchased by CLEC."⁹ "Media" as used in this definition is a fancy word for wire.

56. AT&T lost this position in Texas as related to cross-connects specifically for unbundled loops. Unfortunately, this narrow opening set off a wave of requests by SWBT to establish more and more cross-connect charges for unbundled elements. Oklahoma is the state where SWBT is taking this position to its extreme.

57. In the SGAT, SWBT has unilaterally required the purchase of cross-connects for unbundled loops,¹⁰ dedicated transport,¹¹ and SS7 links.¹² For SS7 links, the cross-connect charge is an astronomical \$70.75 per month per DSO or \$51.15 per month per DS1. This is in addition

⁸ SWBT charges anywhere from \$1.95 up to \$11.85 per month for a cross-connect. Additionally, SWBT charges anywhere from \$88.95 to \$118.95 for non-recurring cost to establish the cross-connect. It is true that, under the SGAT, SWBT proposes to offer cross-connects between standard loops and a UNE local switching port at no charge; the same is true for cross-connects with unbundled dedicated transport at transmission speeds of DS1 and below. SGAT, APPENDIX PRICING at 1, 3. Even here, however, the construct of a separate "rate element" for a cross-connect is artificial. There is no need to create, much less price, separate "cross-connect" elements between the elements that the FCC and the state commissions have recognized; those elements should be priced as fully functional elements, without omitting the connective tissue that enables them to operate in combination with one another or with CLEC facilities. SWBT's multiplication of cross-connect elements adds unnecessary confusion to the process of ordering UNEs, as well as opening the door to excessive charges.

⁹ SGAT, APPENDIX UNE, ¶ 11.1.

¹⁰ *Id.* at APPENDIX PRICING Schedule at 1.

¹¹ *Id.* at 3.

¹² *Id.* at 6.